Filed 5/22/12 In re K.M. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re K.M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE,	C068618
Plaintiff and Respondent,	(Super. Ct. No. 62927)
v.	
K.M.,	
Defendant and Appellant.	

K.M. admitted he came within the provisions of Welfare and Institutions Code section 602 in that he drove a vehicle when he had a blood-alcohol level of .01 percent or greater (Veh. Code, § 23152, subd. (a), reduced to Veh. Code, § 23136, subd. (a)), an infraction. K.M. was 17 years of age when he committed the offenses, just two months prior to his 18th birthday. After K.M. submitted on police reports and a photograph, the court also found true he was a minor in possession of a concealable firearm in violation of Penal Code former section 12101,

subdivision (a)(1),[1] and found the offense to be a felony. Other charges were dismissed. K.M. was declared a ward of the court, placed on probation, and ordered to serve six days in juvenile hall with credit for the six days he already served. An adult at the time of adjudication, K.M. was released.

On appeal, K.M. contends there was insufficient evidence to sustain a finding that K.M.'s concealable firearm offense could be treated as a felony and the court erred in imposing a fine without finding K.M. had the ability to pay. We affirm.

BACKGROUND

In January 2011, K.M. was stopped in his vehicle by police officers after they saw him driving at a high rate of speed and failing to use his turn signal. K.M. told the officers he did not have a driver's license. During their conversation with K.M., the officers noticed the smell of alcohol emanating from K.M. The officers also noticed K.M. had watery eyes and slurred speech. The officers placed K.M. in the back of a patrol car.

There were two passengers in the vehicle K.M. was driving: Nicholas Troy (age 18) and Cesar Parada (age 24). Both passengers were ordered to exit the vehicle and both were searched. During their search of the vehicle, officers found a

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[1] Penal Code section 29610 continues former Penal Code former section 12101, subdivision (a)(1) without substantive change. For ease of reference in this opinion, we will refer to the former Penal Code section as it is the statute identified in the charging petition here.

Raven Arms model P-25 .25-caliber handgun under the front passenger seat.

K.M. admitted the gun found in the car was his. He told the officers he found the gun on the street approximately one month earlier. He said he put the gun under the seat when the officers' patrol car began following him. K.M. gave the officers a detailed description of the gun as well as the live ammunition located inside the magazine and additional rounds found in a brown paper bag. K.M. was taken into custody and booked into the Juvenile Justice Center.

K.M. was later charged with carrying a concealed firearm (Pen. Code, former § 12025, subd. (a)(2)-- count 1), carrying a loaded firearm in public (Pen. Code, former § 12031, subd. (a) -- count 2), driving a vehicle under the influence of alcohol (Veh. Code, § 23152, subd. (a) -- count 3), reckless driving (Veh. Code, § 23103 -- count 4), being a minor in possession of a concealable firearm (Pen. Code, former § 12101, subd. (a)(1) -- count 5), being a minor in possession of live ammunition (Pen. Code, former § 12101, subd. (b)(1)-- count 6), and obliterating the identification of a firearm (Pen. Code, former § 12090 -- count 7).

K.M. admitted to an amended charge of being a minor, driving a vehicle when he had a blood-alcohol level of .01 percent or higher (Veh. Code, § 23136, subd. (a)). He also submitted on the charge of carrying a concealable firearm (Pen. Code, former § 12101, subd. (a)(1)), which the court later found

true and declared a felony. In exchange, the remaining charges were dismissed.

K.M. was declared a ward of the court, placed on probation, and ordered to serve six days in Juvenile Justice Center, with credit for the six days he already served. In addition, K.M. was ordered to complete 80 hours of community service. An adult at the time of adjudication, K.M. was released.

K.M. also was ordered to pay a $100 restitution fine (Welf. & Inst. Code, § 730.6, subd. (b)(1)), a collection fee not to exceed $25, a $100 fine payable to the general fund (Welf. & Inst. Code, § 731, subd. (a)(1)), and a state penalty assessment of $227.50 (Pen. Code, § 1464).

DISCUSSION

I

K.M. contends the court erred in finding the charge of carrying a concealable firearm was a "wobbler" because he claims there was insufficient evidence to prove he was "found guilty" of a prior offense, as required by the language of the statute. We disagree.

In count 5, K.M. was charged with possessing a concealable gun in violation of former Penal Code former section 12101, subdivision (a)(1), a crime which can be punished as either a felony or a misdemeanor. (*In re Jose T.* (1997) 58 Cal.App.4th 1218, 1221.) Penal Code former section 12101, subdivision (a)(1) provides in relevant part that "[a] minor shall not possess a pistol, revolver, or other firearm capable of being concealed upon the person." (Stats. 2008, ch. 698, § 23.)

Penal Code former section 12101, subdivision (c) sets forth the appropriate punishment as follows: "(c) Every minor who violates this section shall be punished as follows:

"(1) By imprisonment in the state prison or in a county jail if one of the following applies:

"(A) The minor has been found guilty previously of violating this section.

"(B) The minor has been found guilty previously of an offense specified in subdivision (b) of Section 12021.1 or in Section 12020, 12220, 12520, or 12560.

"(C) The minor has been found guilty of a violation of paragraph (1) of subdivision (a).

"(2) Violations of this section other than those violations specified in paragraph (1) shall be punishable as a misdemeanor."[2] (Stats. 2008, ch. 698, § 23.)

Because a violation of former section 12101, subdivision (a)(1), is punishable by incarceration in state prison or county jail, it is a "wobbler." (See Pen. Code, former § 12101, subd. (c)(1)(C); *In re Jose T.*, *supra*, 58 Cal.App.4th at p. 1221.)

Here, K.M. claims there is insufficient evidence to find he committed the "wobbler" offense because, to do so, the court was required to find K.M. had previously been found "guilty" of an enumerated crime, or was found "guilty" on the current charge of

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[2] Effective January 1, 2012, Penal Code section 12101, subdivision (c) is now found at Penal Code section 29700. For ease of reference in this opinion, we will refer to the statute by its former number.

carrying a concealable weapon. K.M. explains that "minors in juvenile court are not 'found guilty' of a crime," rather, allegations in a petition are found "true." We are not persuaded.

Although different terminology is used for adults and juveniles in the realm of criminal law, there are several instances where the Legislature has used the term "guilt" or "guilty" in the context of a juvenile disposition. In Welfare and Institutions Code, section 871, subdivision (a), the Legislature established that a minor is "*guilty* of a misdemeanor" if he or she attempts to escape a juvenile facility. (Italics added.) According to the Legislature, a minor who removes his or her electronic monitoring device without permission also is "*guilty* of a misdemeanor." (Welf. & Inst. Code, § 871, subd. (d), italics added.) The Legislature also established that a minor may plead "*not guilty* by reason of insanity" to allegations in a juvenile petition. (Welf. & Inst. Code, § 702.3, italics added.)

The parties do not reference or discuss the state Constitution and the "Three Strikes" law. (See Cal. Const., article I, § 28, subd. (f); Pen. Code, §§ 667, subd. (d)(3), 1170.12, subd. (b)(3); *People v. Garcia* (1999) 21 Cal.4th 1, 3 ["a prior adjudication does qualify as a strike if, in the prior juvenile proceeding, '[t]he juvenile was adjudged a ward of the juvenile court . . . because the person committed an offense listed in subdivision (b) of Section 707 of the Welfare and Institutions Code.'"])

Thus, K.M.'s theory, that the term "guilt," or "guilty," is reserved by the Legislature for convictions in an adult court setting is not borne out by the statutes or constitution. Moreover, were we to accept K.M.'s argument, only those minors found unfit for juvenile court and tried and convicted in adult court would ever face felony consequences. (Welf. & Inst. Code, § 707.) K.M. offers no persuasive reason for why the Legislature would have so limited the application of this provision.

We are not the first appellate court to conclude a minor, adjudicated a ward of the court, can be subject to felony consequences for carrying a concealable firearm. In *In re Jose T.*, *supra*, 58 Cal.App.4th 1218, the Court of Appeal, Second Appellate District, Division One, determined the minor in that case was "'found guilty of a violation of paragraph (1) of subdivision (a)' . . . ," and concluded the crime was a "wobbler." (*Id.* at pp. 1221-1222.) Relying again on his theory that a minor cannot be found "guilty" of a crime in juvenile court, K.M. argues *In re Jose T.* was wrongly decided: "By using the terminology of adult criminal courts, the Court of Appeal adopted the wrong analytical framework . . . ." We are not persuaded.

In sum, the third provision of Penal Code former section 12101, subdivision (c)(1) establishes that every minor who is found to possess a concealed firearm will always have committed the wobbler offense. Here, the court found true the allegation that K.M. possessed a concealable firearm. Accordingly, there

was sufficient evidence to sustain a finding that K.M.'s crime was a wobbler.

II

K.M. also contends the juvenile court erred in imposing a fine pursuant to Welfare and Institutions Code section 731 without first finding he had the ability to pay the fine. We conclude K.M. has forfeited the issue.

K.M. acknowledges he failed to raise his objection in the juvenile court. He also acknowledges "the view taken by various courts of appeal that failure to object to the imposition of a fine or fee is subject to waiver and forfeiture," including this court's decision in *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467-1468.) He notes, however, that the issue is currently before the California Supreme Court in *People v. McCullough* (2011) 193 Cal.App.4th 864, 866-867 [review granted June 29, 2011, S192513] [failure to object in trial court forfeited challenge to sufficiency of evidence of ability to pay jail booking fee], and thus raises the issue solely to preserve it pending further action of the Supreme Court.

Unless and until the Supreme Court decides otherwise, we will follow the long line of cases which have held that challenges to the lack of a finding of an ability to pay a fee or fine and the sufficiency of the evidence to support the same are forfeited where no objection is lodged in the trial court. (*People v. McMahan* (1992) 3 Cal.App.4th 740, 749-750 [failure to object in trial court forfeited challenge to sex offender fine based on ability to pay]; *People v. Crittle* (2007) 154

Cal.App.4th 368, 371 [failure to object in trial court forfeited challenge to crime prevention fine based on lack of ability to pay finding]; *People v. Robinson* (2002) 104 Cal.App.4th 902, 903-906 [failure to object in trial court forfeited challenge based on procedural irregularities and lack of ability to pay costs of preparing probation report]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [failure to object in trial court forfeited challenge to jail booking fee]).

DISPOSITION

The order of the juvenile court is affirmed.

NICHOLSON, Acting P. J.

We concur:

BUTZ, J.

DUARTE, J.